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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 904

ARROW PACKING CORPORATION and GEORGE NEWMAN,

Petitioners,

—vs.—

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated, New York, February 25th, 1946.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associated Justices of the Supreme Court of the United States:

Your petitioners, Arrow Packing Corporation and George Newman, respectfully submit this petition to review the judgment of the Circuit Court of Appeals for the Second Circuit, entered in the above entitled cause on January 29th, 1946, affirming the convictions of your petitioners in the United States District Court for the Southern District of New York.

Opinion Below

The opinion of the Court below (R. 226) has not yet been reported.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on January 29th, 1946 (R. 229). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

Questions Presented

1. Was there substantial evidence which excluded every other hypothesis but that of guilt to support the criminal liability of a corporation and its president for the acts of an employee?

2. Did the court below apply the correct standard of evidence necessary to send the case to the jury?

3. Did the trial court err in refusing to charge as requested?

Statement

The petitioners, together with one Jack Lorsch, a bookkeeper cashier employed by the petitioner, Arrow Packing Corporation were named as defendants in two informations for selling meats at higher prices than the maximum prescribed by the Office of Price Administration, and for failure to keep accurate records for inspection (R. 10-16; 27-31).

The first information concerned six different sales (R. 10-17); a second information concerned four (R. 27-31). In a third information, the petitioner, Arrow Packing Corporation and Jack Lorsch were charged with making eleven sales of meats at higher prices than the maximum pre-

scribed by the Office of Price Administration (R. 17-26). To each of the above counts there was added a count for failure to keep accurate records.

The petitioners were found guilty by a jury on all the counts. The petitioner, Arrow Packing Corporation was fined a total sum of $15,000 (R. 201, 204, 206). The petitioner, George Newman received a total prison sentence of ten (10) months and fined a total sum of $7,500 (R. 202, 206).

Jack Lorsch, who was named as a defendant in two of the informations, withdrew his plea of not guilty and pleaded guilty before the submission of the case to the jury (R. 4). He did not appear as a witness against the petitioners.

The petitioner, Arrow Packing Corporation was engaged in the sale of provisions at wholesale at 2283—12th Avenue, New York, N. Y. The actual connection of the petitioner, George Newman with this corporation does not appear clearly in the record. There is no evidence or testimony which relates to the powers, duties and responsibilities of the petitioner, George Newman or his precise connection with the petitioner corporation, although some witnesses testified that they believed petitioner, Newman to be "the boss".

Jack Lorsch was described by the various witnesses who appeared for the government as the bookkeeper for the petitioner, Arrow Packing Corporation who rendered the invoices and received payments for the products sold.

The government's evidence consisted of the testimony of five retail butchers, and of an official of the Office of Price Administration.

Briefly summarized, the testimony of the five retail butchers upon which the government solely relied for proof of the guilt of the petitioners was as follows:

One retail butcher named James H. Braun, testified that he began purchasing provisions of the petitioner, Arrow Packing Corporation approximately a year prior to his appearance as a witness in this case (R. 35). This witness testified that he purchased provisions at various times and that he received through the mails the invoices covering the purchases (R. 40). Once each week he gathered the invoices and paid the amounts appearing on their face (R. 40). At the end of each week, he made payment of the invoices to the bookkeeper of the petitioner corporation who was identified as the defendant, Jack Lorsch (R. 46). On some occasions he paid the exact amount of the invoices (R. 48); in other cases he paid additional cash to the bookkeeper over and above the amount stated on the invoices (R. 48-49). This witness could not recollect the amount paid in cash in excess of the amount as billed on the invoices (R. 49).

This witness made no mention of the petitioner, Newman. He did not testify that he ever saw Newman at petitioner's place of business. No testimony was given by this witness that the petitioner Newman was ever present when any cash payments were made to the bookkeeper and cashier, Jack Lorsch.

A second witness for the government, one George Lickel, testified that he purchased meat products from the petitioner corporation and paid to the bookkeeper, Jack Lorsch "little cash amounts" of money, which the bookkeeper demanded over and above the amount shown as due on the invoices rendered by the petitioner corporation (R. 92-93).

This witness testified that no one was present when the bookkeeper made these demands and when the payments were made (R. 98).

As for the petitioner, Newman, this witness testified that he had seen petitioner around the market (R. 103) and saw him infrequently at the place of business of the petitioner

corporation, probably only once or twice (R. 103). This witness testified that on most occasions the petitioner, George Newman was not present at the time he purchased meat products (R. 103). This witness did not know petitioner Newman's official connection with the petitioner corporation but knew that he had some interest in it (R. 104).

A third witness, Ralph Haft also testified that he made cash payments to the bookkeeper cashier in excess of the amounts appearing on the invoices rendered by the petitioner corporation (R. 113). He could not recall the amount of cash paid (R. 115).

This witness testified that he saw the petitioner Newman in the place of business of the petitioner corporation only occasionally, dressed in ordinary business clothes (R. 116). He testified that "he had an idea that petitioner Newman was the boss" (R. 117).

Another witness, Murray Meyers also testified that he was a retail butcher and purchased meat products from the petitioner, Arrow Packing Corporation (R. 132). He also testified that he made cash payments to the bookkeeper cashier upon demands made by the defendant Jack Lorsel (R. 135).

There was no testimony by this witness that the petitioner Newman was present when these cash payments were demanded or received. This witness testified that he saw the petitioner Newman only once or twice in the place of business of the Arrow Packing Corporation during the month of April (R. 136), although during that same month he went to the place of business of the petitioner corporation at least a half dozen times (R. 131). On that one occasion he had been waiting to make a purchase and during that time a truckload of provisions was delivered to the place of business of the petitioner corporation which was being moved into the icebox and nothing was being sold until the merchandise had been checked (R. 137). He tes-

tified that he saw the petitioner Newman go into the icebox after the merchandise had been delivered (R. 140). After a short interval, one of the salesmen came out and when the witness asked the salesman for some merchandise, the salesman said to the witness *not in the presence of the petitioner Newman* that he could not have any merchandise for "Newman is billing it all up for different purposes" (R. 140).

This witness testified that he knew the petitioner Newman was president of the petitioner corporation, although upon cross examination he admitted that he had no personal knowledge of that fact (R. 153-154).

The only witness who testified to any conversation with the petitioner Newman in respect to any purchase was the witness Durutei Bayobeni. This witness testified that on two occasions he purchased meat products and at the demand of the bookkeeper had paid cash sums over and above the invoice prices (R. 66-69). On the third occasion he testified that he purchased 100 lbs. of turkey for which he was charged by Lorsch $55. (R. 70). The witness in describing this transaction at first made no mention of the petitioner Newman. Upon further prompting, however, he testified that he "talked to the boss himself" identifying the petitioner Newman. The petitioner Newman is alleged to have told the witness that if he did not want the turkeys at $55. he need not take them (R. 71). This witness testified that the turkeys were delivered and that he paid to the driver whom he did not identify, the sum of $55. by delivery of a check in the sum of $44.50 and cash in the sum of $10.50 (R. 72). The only other time this witness testified he saw this petitioner was when petitioner came up to his place of business to collect the check which had been returned for insufficient funds (R. 73). Criminal proceedings were commenced against this witness and the charge against this

witness was disposed of by payment to the petitioner Newman of the amount of the check in the sum of $44.50 which represented the ceiling price of the turkeys (R. 74).

The final witness for the government, Emil Mang, a price specialist for the Office of Price Administration, testified to the ceiling prices which prevailed for the meat products during the period embraced by the informations involved (R. 157-170).

At the conclusion of the government's case (R. 171-178), and at the conclusion of the entire case, counsel for petitioners moved for a dismissal and a directed verdict of acquittal. The motions were denied, although the trial judge admitted that the evidence against the petitioner Newman was not strong (R. 176). The trial court also stated that if there could be more proof than there is in the record "it would be more satisfying as to (petitioner) Newman's alleged connections with the offenses charged in the informations" (R. 178). The trial court admitted that the overpayments were not made in the presence of the petitioner, Newman, but in its instructions to the jury, left it to the jury to determine whether there was "other evidence indicating that it was done to his (petitioner's) knowledge and approval" (R. 140). The trial court, in its various rulings upon the evidence, left it to the jury to determine whether "there are other facts and other circumstances" which would give petitioner Newman knowledge that these overcharges were being demanded and received by Lorsch acting as bookkeeper for the corporation (R. 94-97; 120-122; 139; 140).

Before the submission of the case to the jury, counsel for the petitioners requested the trial court to charge as follows (R. 196):

> "To warrant a conviction on circumstantial evidence each fact necessary to the conclusions of guilt must be

proved beyond a reasonable doubt, and all the facts so proved must be consistent with each other and with the main fact sought to be proved, and the circumstances, taken all together, must be of a conclusive nature and producing in effect a reasonable and moral certainty that the accused committed the offense charged. The mere union of a limited number of independent circumstances, each of an imperfect and inconclusive character, will not justify a conviction. They must be such as to create and justify full belief according to the standard rules of certainty. It is not sufficient that they coincide with and render probable the guilt of the accused. The facts so proved must be incompatible with innocence and incapable of explanation upon any other reasonable theory than that of guilt."

This request was denied and exception duly taken (R. 190).

The Circuit Court of Appeals affirmed the judgment of the petitioners as to all counts except the second count of the first information. As to that count, the Circuit Court of Appeals reversed the judgment of conviction (R. 229).

The Circuit Court of Appeals in its opinion concluded that in view of the testimony of the witness, Bayobeni the jury was required to infer that the petitioner Newman was a confederate of Lorsch in all the purchases and sales (R. 227).

Specification of Errors To Be Urged

The Circuit Court of Appeals for the Second Circuit erred:

1. In holding that there was sufficient evidence which excluded every other hypothesis but that of guilt, justify-

ing the submission of the question of the guilt or innocence of the petitioners to the jury.

2. In holding that the Trial Court did not err in refusing to charge as requested.

3. In affirming the judgments of conviction.

Reasons for Granting the Writ

In recent years, the Circuit Court of Appeals for the Second Circuit has consistently applied a standard of evidence in criminal cases necessary to send a case to a jury which appears to be basically inconsistent with the generally accepted principles of law.

In *United States* v. *Feinberg*, 140 F. (2d) 592 (C. C. A. 2d, 1944) and in *United States* v. *Cohen*, 145 F. (2d) 82 (C. C. A. 2d, 1944), the Circuit Court of Appeals for the Second Circuit has ruled that the standard of evidence necessary to send a case to the jury is the same in both civil and criminal cases; and that, given evidence from which a reasonable person might conclude that the charge in an indictment was proved, the Court will look no further, the jury must decide and the accused must be content with the instruction that before finding him guilty they must exclude all reasonable doubt.

Although these decisions are not cited in the opinion of the lower court, it is apparent that the Court has applied the same standard, for under no other standard could evidence so meagre, so vague and so indefinite be submitted to a jury for determining the guilt or innocence of a person accused of a crime.

In this case, there was no substantial evidence that the petitioner Newman, authorized, directed or had knowledge of the alleged overcharges. No witness testified that the

petitioner Newman was present at any time that these overcharges were demanded by the bookkeeper and paid by the retail butchers.

Viewing the evidence introduced by the government in its most favorable light, the most we have is that on different occasions the bookkeeper demanded and received cash in unspecified amounts in addition to the prices appearing upon the invoices sent out by the petitioner corporation. The lower court in its opinion, judging the responsibility of the petitioners by the standards applicable in civil cases held criminally responsible the alleged president of the petitioner corporation and the petitioner corporation for the acts of an employee. The application of such a rule and such a standard is so clearly inconsistent with the applicable fundamental principles of law, that it plainly calls, we believe, for review by this Court.

It is well settled that the civil doctrine that a principal is bound by the acts of his agent within the scope of the agent's authority has no application to the criminal law. *Nobile* v. *United States*, 284 Fed. 253, 255 (C. C. A. 3rd, 1922); *Paschen* v. *United States*, 70 F. (2d) 491 (C. C. A. 7, 1934); *United States* v. *Food & Grocery Bureau of So. Cal.*, 43 F. Supp. 966 (D. C. S. D. Calif., 1942); *United States* v. *Corlin*, 44 F. Supp. 940 (D. C. S. D. Calif., 1942).

It is further well settled that there is no criminal responsibility of a principal for the acts of his agent, unless the principal knowingly and intentionally aids, advises or encourages the criminal act committed by the agent.

In *Paschen* v. *United States, supra*, 70 F. (2d) 491, 503 (C. C. A. 7th, 1934), the court wrote as follows: "• • • civilly one is responsible for the acts and doings of his accredited agent acting within the scope of his authority, while one may be criminally liable only in case he inten-

tionally does that which the law denounces and penalizes. *Nobile* v. *United States* (3 Cir.), 284 F. 253."

At common law, the rule was firmly established that a principal could not be indicted criminally for the act of a servant.

In *Hardcastle* v. *Bielby* (1892), Q. B. 709, Collins, *J.* said at page 712: "It is a general principle of law that a man is not liable to be indicted criminally for the act of his servant."

It is important to bear in mind that the statute applicable to the offenses with which the petitioners were charged punished only *wilful* violations of the regulation. The element of wilfulness necessary to a conviction certainly demands the clearest and most satisfactory evidence before a corporation or an officer thereof could be held criminally responsible for the acts of an employee.

The lower court, in its opinion argues, that while it was possible that the bookkeeper was uniformly engaged in a course of unlawful dealing on his own account, it was not at all probable (R. 227). However, as the court held in *Wolf* v. *United States,* 238 Fed. 902 (C. C. A. 4, 1916), moral probability, however strong, cannot take the place of legal evidence and any inference of guilt which the jury may draw must be based on facts tending to show a plain and unmistakable commission of an offense.

In another case, *Karchmer* v. *United States,* 61 F. (2d) 623, it was held that a verdict of conviction, resting on speculation and conjecture, from evidence consistent with the theory of the innocence of the accused, cannot stand.

The trial judge admitted that the evidence against the petitioner Newman was not strong (R. 176). It is our respectful submission that there was no substantial evidence of fact which excluded every other hypothesis but that of

guilt, which warranted the submission of this case to the jury. The verdict of the jury in this case can only be supported by the application of the broad standard adopted by the lower court which fails to draw any distinctions between civil actions and criminal prosecutions. The theory of the Circuit Court of Appeals that fails to distinguish between civil actions and criminal prosecutions is fundamentally fallacious and destroys the foundations upon which our entire criminal jurisdiction is built.

In *Lilienthal* v. *United States*, 97 U. S. 237, this Court very explicitly stated tne distinction between civil and criminal cases in respect to the degree or quantum of evidence necessary to justify the jury in finding their verdict. There has been no modification by this Court of the quantums of evidence necessary to justify a conviction of an accused. There has been no relaxation of the requirements and the decision of the lower court which gives judicial support to the verdict of the jury in this case is a clear departure from the fundamental principles of law.

This Court and courts in other circuits have adopted a stricter standard of guilt and have not hesitated to scrutinize with care the record to determine whether the evidence was substantial enough to warrant the submission of the case to the jury.

In *Mortensen* v. *United States*, 322 U. S. 369, 374 this Court wrote that it would never hesitate to examine a record to determine whether there was any competent and substantial evidence fairly tending to support the verdict.

In *Hammond* v. *United States*, 127 F. (2d) 752 (C. C. A. Dist. of Col. 1942), the court wrote: "In the present case there was, as there always is in a criminal prosecution, a legal presumption that appellant was innocent until proved guilty beyond a reasonable doubt. 'Unless there is substantial evidence of facts which exclude every other hy-

pothesis but that of guilt it is the duty of the Trial Judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment against him.' *Isbell* v. *United States*, 8 Cir., 227 F. 788, 792."

If the standard adopted by the lower court in this case is permitted to stand, many traditional principles and standards will be upset. Even a cursory reading of the lower court's opinion will demonstrate the extent to which the lower court has gone to support a verdict based entirely upon guess, suspicion and surmise. The court's logic, when resort is made to logic can be easily refuted. The lower court below reasons that the testimony of Bayobeni demanded the inference that the petitioner Newman was a confederate of the corporation's bookkeeper, in all the purchases.

It is difficult to perceive how an alleged isolated conversation with one retail butcher could have any logical or relevant connection with the other purchases entirely unconnected and made at entirely different times.

The lower court's further conclusion that there was evidence to support the verdicts upon the counts for failing to keep accurate records (R. 228) is the result of circuitous reasoning. The lower court argues that since the overcharges were paid in cash, and the receipts given were for the ceiling prices, the jury could not rationally have concluded otherwise than that books were kept in accordance with the receipts and were false (R. 228). This reasoning, of course, assumes that the overcharges were known to the petitioners—an issue upon which there was absolutely no clear or credible evidence. Of course, if you start with the assumption of petitioners' guilty participation, you are

bound to reach a conclusion of guilty participation. This is clearly begging the question.

Another phase of this case illustrates the general inadequacy of the trial. The entire charge of the trial court (R. 183-190) was general and failed to present clearly and adequately the issues of fact to be decided by the jury. The trial court made no reference to the informations or the nature of the offenses involved. There was no reference to the statute which was the basis of the informations and the jury was left completely in the dark as to its precise duty.

The requested instruction (R. 196) stated correctly the applicable principle of law *Becher* v. *United States*, 5 F. (2d) 45 (C. C. A. 2d, 1924); *United States* v. *Tatcher*, 131 F. (2d) 1002 (C. C. A. 3rd, 1942). The substance of the requested charge was not covered adequately in the charge of the Trial Court. Certainly, in a case based entirely upon circumstantial evidence, the trial court was required to give the requested instruction which stated a fundamental principle of law.

This case raises important questions on the administration of federal criminal justice. It is respectfully submitted that the guilt or innocence of the petitioners was not ascertained by the jury under appropriate judicial guidance. The evidence offered against the petitioners was weak and unconvincing. In appraising the jury's verdict, the Circuit Court of Appeals applied an entirely insufficient and improper standard.

WHEREFORE, your petitioners pray that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify the case to this Court for review and determination, as pro-

vided by the Statutes of the United States, and that your petitioners may have such other and further relief in the premises as this Court may deem proper.

ARROW PACKING CORPORATION and
GEORGE NEWMAN,
Petitioners,
By IRVING SPIELER,
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Dated, New York, February 25th, 1946.